

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Midcontinent Communications)	MB Docket No. 12-317, CSR-8735-E
)	MB Docket No. 12-318, CSR-8736-E
Petitions for Determination of Effective)	MB Docket No. 12-319, CSR-8737-E
Competition in Twenty-Three Communities in)	MB Docket No. 12-320, CSR-8738-E
South Dakota)	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 2013

Released: June 28, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Midcontinent Communications, hereinafter referred to as “Petitioner,” has filed with the Commission four petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁵ See 47 C.F.R. §§ 76.906-.907(b).

households in the franchise area.⁶ This test is referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁷ It is undisputed that the Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁸ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.⁹ We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming,¹¹ and is supported in the petitions with copies of channel lineups for both DIRECTV and DISH.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Petitioner sought to determine the competing provider DBS penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.¹⁴ Petitioner asserts that it is the largest MVPD in the eight franchise areas.¹⁵

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,¹⁶ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we

⁶ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

⁷ 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

⁸ See Petitions at 5-7.

⁹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁰ 47 C.F.R. § 76.905(e)(2).

¹¹ See 47 C.F.R. § 76.905(g); see also Petitions at 4.

¹² See Petitions at Exhibit 2.

¹³ See Petitions at 4.

¹⁴ Petitions at 8. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

¹⁵ See Petitions at 8.

¹⁶ Petition at 8-10, Exhibits 1 and 6.

conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceedings by Midcontinent Communications **ARE GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert
Senior Deputy Chief, Policy Division, Media Bureau

¹⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 12-317, CSR 8735-E

MB Docket No. 12-318, CSR 8736-E

MB Docket No. 12-319, CSR 8737-E

MB Docket No. 12-320, CSR 8738-E

COMMUNITIES SERVED BY MIDCONTINENT COMMUNICATIONS

Communities	CUID	CPR*	2010 Census Households	DBS Subscribers ¹⁸
Baltic	SD0138	16.71%	389	65
Belle Fourche	SD0009	27.52%	2,322	639
Boulder Canyon	SD0116	20.69%	203	42
Canton	SD0053	27.00%	1,248	337
Central City	SD0038	31.82%	66	21
Deadwood	SD0010	34.49%	661	228
Gayville	SD0316	27.61%	163	45
Harrisburg	SD0321	31.62%	1,423	450
Lead	SD0012	33.38%	1,420	474
Madison	SD0040	28.89%	2,627	759
Meade Co. (Unincorporated)	SD0110 SD0165 SD0035	19.38%	5,331	1,033
Meckling	SD0325	20.00%	35	7
Pennington Co. (Unincorporated)	SD0054 SD0262 SD0282 SD0283 SD0309	22.35%	9,717	2,172
Rapid City	SD0001	16.59%	28,586	4,742
Sioux Falls	SD0017	18.91%	61,707	11,671
Spearfish	SD0013	18.17 %	4,644	844
Sturgis	SD0014	21.02%	2,916	613
Summerset	SD0323	26.56%	655	174
Tea	SD0322	26.40%	1,254	331
Vermillion	SD0047	20.57%	3,811	784
White Wood	SD0106	32.89%	374	123
Yankton	SD0046	16.11%	5,909	952

*CPR = Percent of competitive penetration rate of DBS

¹⁸ The allocated DBS subscriber figures presented in the petitions were not whole numbers so those figures have been rounded down to the nearest whole subscriber.